The COMMITTEE for JUSTICE

MICHAEL W. MCCONNELL:
DEFENDING LIBERTY AND EQUALITY

On June 26, 2002, the U.S. Court of Appeals for the Ninth Circuit provoked nationwide outrage when—in the middle of a global war on terrorism—it decided to rule that the Pledge of Allegiance is unconstitutional.[1] The reason? Because it includes the words "under God." This, according to the San Francisco-based appellate court, was an "establishment of religion" in violation of the First Amendment: the constitutional equivalent of the government drawing up articles of faith and compelling religious observance.

But the Ninth Circuit provoked more than outrage. It also inspired Americans to think about the need for government institutions to respect our nation's longstanding history of religious expression, and the need to appoint federal judges who will refrain from using their posts as an occasion to legislate from the bench. The day after the Ninth Circuit's ruling, President Bush affirmed that:

> America is . . . a nation that values our relationship with an Almighty. Declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we received our rights from God, as proclaimed in our Declaration of Independence.[2]

The President then pledged to nominate judges who are committed to preserving the vital religious liberties guaranteed by our Constitution, but who will not abuse their powers to purge all mention of religion from the public sphere: "we need common-sense judges who understand that our rights were derived from God. And those are the kind of judges I intend to put on the bench."

In fact, President Bush had already nominated such a candidate: Michael W. McConnell, currently a professor at the University of Utah College of Law, and tapped on May 9, 2001 to fill a vacancy on the U.S. Court of Appeals for the Tenth Circuit. Professor McConnell is one of the keenest legal minds of his generation. Few would deny that he has been an extraordinarily influential scholar of religious liberty; nor can one ignore his repeated successes as a lawyer before the Supreme Court. More importantly, throughout the course of Professor McConnell's career in academia, and in practice before the Supreme Court, he has sought to ensure that society's weakest members—especially members of minority religions who face discrimination and indifference from the majority—receive the full protections of the law. As a result, McConnell's nomination has elicited unprecedented support from the ivory tower. Over 300 law professors, of every political and ideological stripe, have signed a letter urging the Senate Judiciary Committee to approve his nomination immediately. We enthusiastically join their call.

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[1] *See* Newdow v. US Congress, 292 F.3d 597 (9th Cir. 2002).
[2] Remarks by President Bush and Russian President Putin in Photo Opportunity, June 27, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/06/20020627-3.html.

A Stellar Legal Career

Professor Michael W. McConnell has had a distinguished career that has earned him a reputation as one of the top legal scholars in the country; he is widely recognized to be the nation's foremost authority on the topic of religious liberty. But Professor McConnell has distinguished himself in many more ways than as an academic. He is also a first-rate practicing attorney, arguing eleven cases before the Supreme Court, and has served in the United States government with distinction. Having mastered both the teaching and practice of law, Professor McConnell promises to become a highly regarded, and highly influential, member of the federal bench.

Professor McConnell's singular legal career was prefigured by his academic successes in college and in law school. After receiving his bachelor's degree from Michigan State University in 1976, he matriculated at the University of Chicago's Law School, one of most esteemed institutions in the United States. He served as the Comment Editor of the *University of Chicago Law Review*, and graduated at the top of his class in 1979. In addition, McConnell was elected to the Order of the Coif, a nationwide honor society for truly outstanding law students.

Professor McConnell began his career as a law clerk to two of the 20th century's leading liberal jurists: William Brennan and J. Skelly Wright. From 1979 to 1980, he clerked for Chief Judge J. Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit. The next year, he clerked on the United States Supreme Court—the highest honor that can be bestowed on a young lawyer. His service to Justice William Brennan lasted from 1980 to 1981.

After his clerkships, McConnell sought a job where he would be able to use his legal training to better the lives of his fellow citizens. He became Assistant General Counsel at the Office of Management and Budget, and served there from 1981 to 1983. From 1983 to 1985, he served as Assistant to the Solicitor General in the Department of Justice, where he represented the interests of the federal government before the Supreme Court.

Although Professor McConnell left government service in 1985, he has never stopped serving the public. He returned to the University of Chicago's Law School in 1985, this time as a professor, and also taught on a visiting basis at Harvard Law School. Harvard offered him a tenured professorship, but he turned it down. Needless to say, Ivy League institutions are not accustomed to professors declining their offers of employment. One Harvard professor, who strongly supports McConnell's nomination, jokes: "My primary reservation about Professor McConnell is that our law school has made him an offer of appointment as a tenured professor of law, and I and my colleagues would very much like to see him here at Harvard."[3]

In 1996, McConnell decided to give up his prestigious professorship at the University of Chicago, and he became a Presidential Professor at the University of Utah College of Law. McConnell decided to leave the city of Chicago because of his conviction that it would be easier for his wife and him to raise their three young children in the relative peace and tranquility of Utah.

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[3] Letter from Daniel J. Meltzer to Senator Orrin Hatch, July 3, 2001.

Professor McConnell is perhaps best known as an expert on the Constitution's religion clauses, and he has devoted countless law review articles to exploring America's tradition of religious liberty. The consistent theme running through McConnell's writings is the principle of equality: the government must never give preferential treatment to religion generally, or to any one faith in particular. But neither should it subject religious belief or practice to any special burdens. McConnell's writings have proven extraordinarily influential in the legal academy; his religious-liberties articles have become required reading for anyone who takes the subject seriously. According to Harvard Law School professor Richard Fallon, McConnell's "work on the Religion Clauses of the First Amendment establishes him as among the best scholars working in the field, if not indeed the preeminent one."[4]

Professor McConnell also has had the opportunity to put his ideas into practice, arguing a total of eleven cases before the United States Supreme Court. To name only two, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[5] the Supreme Court adopted McConnell's argument that a state university that provides funding to student organizations cannot discriminatorily exclude religious groups. The Court again agreed with McConnell in *Mitchell v. Helms*,[6] where he argued that government agencies in Louisiana could lend educational materials to parochial schools on the same terms that they lend them to state schools—a position supported by the Clinton administration.

A Commitment to Equality

Professor McConnell's dedication to the principle that all religions should receive equal treatment at the hands of the government is evidenced by the fact that, as a lawyer, he has represented diverse groups representing all perspectives. His clients have included Mormons, Hare Krishnas, Jehovah's Witnesses, Christian Scientists, Bible clubs, the United States Catholic Conference, a Seventh-day Adventist college, and followers of Eckanakar (a New Age religion). Professor McConnell has submitted amicus briefs advancing the views of numerous churches, the American Jewish Committee, and the Anti-Defamation League. He has even served as a lawyer for People for the American Way, and Americans United for Separation of Church and State.

In a string of law review articles, cases, and congressional testimony, Professor McConnell has fought for more muscular enforcement of the First Amendment's guarantee of the free exercise of religion than is currently recognized by the Supreme Court. According to Professor McConnell, an otherwise neutral law that imposes a burden on religious practices should have to satisfy the most exacting level of constitutional scrutiny. Unless the government shows that applying the law to the religious practice is a "narrowly tailored" way of achieving a "compelling interest," it would have to grant an exemption. Thus, for example, if a state government banned the consumption of wine, it would have to grant an exemption to the Catholic Church for use in Communion. Indeed, minority religions would be the principal beneficiaries of McConnell's views: large religions with many followers have the political clout

[4] Letter from Richard H. Fallon, Jr. to Senator Patrick Leahy, June 6, 2001.
[5] 515 U.S. 819 (1995).
[6] 530 U.S. 793 (2000).

to ensure that legislatures do not pass laws that burden their practices. Adherents of small, obscure faiths have no recourse but to turn to the courts.

It bears emphasis that these views are far more protective of religious liberty than is current Supreme Court caselaw. In *Employment Division v. Smith*,[7] the Supreme Court—in an opinion by Justice Scalia—held that Oregon's prohibition on the use of peyote did not violate Native Americans' free exercise rights, despite the fact that sacramental peyote ingestion was the central religious practice of a centuries-old religion called the Native American Church. Professor McConnell has repeatedly criticized Justice Scalia's opinion in *Smith*. According to McConnell, Scalia's ruling is "contrary to the deep logic of the First Amendment," and Scalia's use of precedent was "troubling, bordering on the shocking."[8] Justice Scalia himself has gone out of his way to describe Professor McConnell as "the most prominent scholarly critic" of Justice Scalia's opinion in *Smith*.[9]

Professor McConnell's views on religious liberty did not prevail in *Smith*, but they did in another Supreme Court case three years later. In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[10] McConnell successfully helped defend adherents of Santeria, an Afro-Cuban religion, when officials in a Florida city discriminatorily tried to ban their practice of animal sacrifice. The case made its way to the Supreme Court, where Professor McConnell filed an amicus brief on behalf of the Santerians. The Court unanimously held that Hialeah's ordinances were unconstitutional because they targeted specific religious practices for hostile treatment. Even more noteworthy, in that case Professor McConnell was a lawyer for Americans United for Separation of Church and State.

McConnell's dedication to the cause of religious liberty has been as persuasive in Congress as it has in the Supreme Court. In 1993, he was a driving force behind the Religious Freedom Restoration Act ("RFRA"). That law required the government, whenever its regulations impose a burden on religious practices, to demonstrate that its interest in passing the law compellingly outweighs the resulting burden on an individual's religious liberty. Professor McConnell appeared before congressional committees on several occasions to support RFRA, and the bill was enacted by overwhelming majorities in both houses of Congress. Nine of the ten Democrats currently on the Senate Judiciary Committee were members of Congress in 1993, and every one of them voted for the bill.

Like many members of Congress, Professor McConnell was dismayed when the Supreme Court found portions of RFRA unconstitutional in *City of Boerne v. Flores*.[11] He believed that the Court had failed to show due deference to Congress's constitutional powers, and he authored a law review article sharply criticizing the majority opinion, as well as Justice Scalia's

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[7] 494 U.S. 972 (1990).
[8] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHIC. L. REV. 1109, 1111-20 (1990).
[9] City Of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Scalia, J., concurring).
[10] 508 U.S. 520 (1993).
[11] 521 U.S. 507 (1997).

concurrence. Professor McConnell wrote: "the Court was wrong to conclude that [RFRA] was not within the legitimate range of legislation enforcing the Bill of Rights."[12]

Professor McConnell also was a leading proponent of the Native American Free Exercise of Religion Act, co-sponsored by Senator Feingold, which was designed to protect Native Americans' sacred sites on federal land, traditional use of peyote, and use of eagles and other animals and plants. During his Congressional testimony in support of the Native American Free Exercise of Religion Act, Professor McConnell stated: "Congress has a responsibility . . . to come to terms with the many violations of free exercise rights of Native Americans that have occurred over the centuries, and to ensure that these Americans are protected in what most Americans consider their most precious and inalienable right. The Native American Free Exercise of Religion Act is a step in that direction."[13]

This commitment to the rights of religious minorities is further evidenced in Professor McConnell's opposition to a constitutional amendment that would have permitted public school sponsored prayers. In testimony before the Senate Judiciary Committee, McConnell argued: "I do not believe that officially sponsored, vocal classroom prayer can be administered without effectively coercing those in the minority. And that should not be permitted."[14] Professor Doug Laycock of the University of Texas Law School, one of the nation's preeminent religion scholars, emphasizes that McConnell "supports the right of religious minorities to practice their faiths free of nonessential government regulation. He opposes school-sponsored prayer. He has said that the Supreme Court's decision upholding legislative prayer was unprincipled."[15] No wonder Laycock concludes that "[o]n these issues, he is closer to the ACLU than to Justice Scalia."

Professor McConnell's dedication to bettering the lives of the less fortunate begins with his religious liberties jurisprudence, but it does not end there. During his tenure at the University of Chicago, McConnell served on the board of the Austin Christian Law Center, a Chicago-area clinic that provides legal services to the indigent. The chairman of the Center's board recently wrote a letter to the Senate Judiciary Committee emphasizing that Professor McConnell's "commitment to justice for all, including the unpopular, is well known. I want to be certain that his commitment to justice for those at the bottom of America's economic ladder, as demonstrated by his efforts in Chicago, also becomes known."[16] Professor McConnell also authored an amicus brief in the Supreme Court case of *Sale v. Haitian Centers Council, Inc.*,[17] where he disputed the legality of the first Bush Administration's policy authorizing the deportation of certain aliens who faced persecution in their home countries. Professor McConnell's clients in that case were three former Democratic Attorneys General: Nicholas Katzenbach, Benjamin Civiletti, and Griffin Bell.

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[12] Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 847 (1998).
[13] *Hearings on S. 1021, The Native American Free Exercise of Religion Act, Before the Senate Comm. on Indian Affairs*, 103d Cong. (Sept. 10, 1993).
[14] *Hearings on S.J.Res. 7 Before the Senate Comm. on the Judiciary*, 104th Cong. (Sept. 29, 1995).
[15] Letter from Douglas Laycock to Senator Patrick Leahy, July 2, 2001.
[16] Letter from Case Hoogendoorn to Senator Patrick Leahy, September 10, 2001.
[17] 509 U.S. 155 (1993).

As his representation of three Democratic Attorneys General indicates, Professor McConnell's career has been marked by a streak of intellectual independence. He refuses to toe the official party line of either the right or the left. For example, he publicly opposed the impeachment of President Clinton: "This last tit-for-tat has blown up in the face of Republicans. Maybe we're going to take a step back and focus not so much on character assassination."[18] And during the 2000 election controversy, Professor McConnell criticized the Supreme Court's decision in *Bush v. Gore*,[19] which halted Florida's recount of disputed presidential ballots. In a *Wall Street Journal* op-ed entitled "A Muddled Ruling," he wrote:

> The question of remedy is the troubling aspect of the decision. The five justices in the majority held that, since there is no time to complete a proper recount by Dec. 12, all recounting must end. Justices Breyer and Souter argued that the real deadline is Dec. 18, and that the court should remand for the Florida court to decide whether to try to accomplish a recount by that time. As a matter of federal law, Justices Breyer and Souter have the better argument. . . . [T]he decision is one for the state to make. It would have been the better course, as a federal court, to remand.[20]

We are confident that Professor McConnell will bring the same integrity and independence to the federal bench.

Universally Esteemed

Given Professor McConnell's longstanding commitment to improving the lives of his fellow citizens, and to using the law as a tool to protect the rights of our society's weakest and most vulnerable members, it should come as no surprise that he is supported by his colleagues in the legal academy. What's truly surprising, however, is the professors' unanimity. Law professors are notoriously fractious. And yet scholars from across the political and ideological spectrum—Republicans and Democrats, conservatives and liberals alike—have all joined in enthusiastically praising Professor McConnell's nomination. Almost to a person, they agree that McConnell would make a fair and impartial jurist, one before whom all litigants, no matter what their cause, would be assured of getting a fair shake.

In an undated letter from last year, over 300 law professors and law school deans urged the Senate Judiciary Committee to approve McConnell for the Tenth Circuit without delay.[21] The 300 professors emphasized that McConnell's scholarship has been "path-breaking and influential." More importantly, his writings are "characterized by care, thoroughness, and fairness to opposing viewpoints." Professor McConnell thus "provides a model of the wisdom, intelligence, temperament, craftsmanship, and personal qualities that can make a judge outstanding."

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[18] *Quoted in* John Heilprin, *Cannon, Owens Square off Again as Panel Debates Who Should Handle Impeachments*, SALT LAKE TRIB., Mar. 9, 1999, at A1.
[19] 531 U.S. 98 (2000).
[20] Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 4, 2000, at A26.
[21] Letter to Senator Orrin Hatch, *available at* http://www.usdoj.gov/olp/michaelmcconnellsupportletter.htm.

Equally noteworthy is the fact that the letter was signed by academics who disagree with Professor McConnell's legal conclusions, to say nothing of his personal political views. Despite their substantive differences, the 300 professors emphatically agreed that McConnell has the cast of mind, and the commitment to the rule of law, necessary for service as a federal judge:

> Many of the signers of this letter are Democrats who did not vote for the President who nominated Professor McConnell. Some of us have disagreed with McConnell on constitutional issues and undoubtedly will disagree with him again. All of us, however, hope that the Senate will confirm Professor McConnell without greater delay than is necessary to fulfill its important Constitutional responsibilities. In our view, Michael McConnell is a nominee of exceptional merit whose confirmation warrants bipartisan support.

The significance of this letter cannot be overestimated, as law professors Akhil and Vikram Amar stressed in a recent *Findlaw.com* column entitled "We Like Mike."[22] The list of over 300 names "was genuinely bipartisan and cross-sectional, featuring dozens of leading 'liberal' as well as 'conservative' scholars." It included left-leaning luminaries such as Stephen Carter, Michael Dorf, John Hart Ely, Elena Kagan, Lawrence Lessig, Sanford Levinson, H. Jefferson Powell, and Cass Sunstein; as well as right-tilting academics like Lillian BeVier, Steve Calabresi, Richard Epstein, Charles Fried, Mary Ann Glendon, and Doug Kmiec. As the Amar brothers point out: "Rarely do law professors—by nature a contentious lot, rewarded for strong opinions—come to such universal consensus. It is hard to imagine many other things that the above-named professors (to say nothing of the broader list of 300) could all agree on."

Like many of the letter's signatories, the Amars are self-described "registered Democrats who voted for Al Gore and Joe Lieberman." They further emphasize that they "have not hesitated to publicly oppose the Bush Administration where we think its policies endanger constitutional liberty." "But on the subject of the McConnell nomination," they offer, "we applaud the Bush Administration. Here is an issue where thoughtful Democrats and Republicans, liberals and conservatives, should come together."

It takes no more than a cursory survey of the dozens and dozens of letters Professor McConnell's supporters have sent to the Senate Judiciary Committee to reveal that Akhil and Vikram Amar are hardly the only Democrats who hold that view. Countless prominent Democratic and liberal law professors have put pen to paper to testify about McConnell's intellectual honesty, fairness in debate, and commitment to the rule of law.

Perhaps the most striking endorsement of McConnell comes from Laurence Tribe, a professor at Harvard Law School. Students of the judicial appointments process will recall that in April 2001 Professor Tribe attended a retreat with 42 Senate Democrats, advising them on ways to respond to President Bush's judicial nominations. According to one participant, Tribe and other panelists "said it was important for the Senate to change the ground rules and there was

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[22] Akhil Reed Amar & Vikram David Amar, *We Like Mike: An Open Letter to Senator Patrick Leahy in Support of Judicial Nominee Michael McConnell*, Feb. 8, 2002, http://writ.corporate.findlaw.com/amar/20020208.html.

no obligation to confirm someone just because they are scholarly or erudite."[23] More recently, Professor Tribe testified before a subcommittee of the Senate Judiciary Committee, in which he urged members to screen the President's judicial nominees for ideological fitness.[24]

But not even Professor Tribe believes that his new confirmation rules stand in the way of Professor McConnell becoming a federal judge. In an email to the Senate Judiciary Committee, Tribe writes: "As a person, Michael is exemplary, exhibiting openness to opposing views and a gentleness with others that commend him as someone likely to display an ideal judicial temperament. Many of his views on constitutional issues differ strongly from my own, but I have never thought that agreement with me on all such issues should be a prerequisite for my support in a context like this."[25]

Cass Sunstein, McConnell's former colleague at the University of Chicago Law School, holds the same view. (Also like Tribe, Sunstein attended the Democrat retreat and has testified before the Senate in favor of evaluating judicial nominees on the basis of their ideologies.[26]) Sunstein writes: "McConnell combines strong convictions not only with an ability to respect opposing views but also with the capacity to listen carefully, and on occasion to change his mind. . . . On issues ranging from free speech to affirmative action to sex equality to abortion, he is genuinely willing to think, and to go where the best arguments take him."[27] He concludes: "Those of us who are most concerned about judicial hubris in the name of the Constitution do not have much to fear from McConnell. . . . I know that he would faithfully follow the law as it now stands."

Equally compelling is the testimony of Elena Kagan, now a professor at Harvard Law School, and late of the Clinton White House.[28] According to Professor Kagan, McConnell is an ideal candidate to be a federal judge:

> In all that time, I never knew Michael to be anything other than thoughtful, open-minded, and even-handed in his approach to legal questions. There is no part of Michael that is activist or extremist. He is one of the most fair and scrupulous individuals I have ever encountered. I do not believe he ever would bend the law to get to a political result. I disagree with Michael on some important matters, as I am sure you and other members of the Judiciary Committee do. But I am confident that as a judge, he would handle each and every case, regardless of the legal issue at stake, with the qualities of honesty, integrity, and fidelity to law that all his academic colleagues recognize in him.

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[23] *Quoted in* Neil A. Lewis, *Washington Talk; Democrats Readying for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

[24] *See The Judicial Nomination and Confirmation Process: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary*, 107th Cong. 39-57 (2001) (statement of Laurence H. Tribe).

[25] Email from Laurence H. Tribe to Senator Patrick Leahy, June 22, 2001.

[26] *See The Judicial Nomination and Confirmation Process: Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary*, 107th Cong. 57-67 (2001) (statement of Cass R. Sunstein).

[27] Letter from Cass R. Sunstein to Senator Patrick Leahy [undated].

[28] Letter from Elena Kagan to Senator Patrick Leahy, Sept. 10, 2002.

Professor Kagan knows whereof she speaks. As one of President Clinton's nominees to the U.S. Court of Appeals for the D.C. Circuit, who never received a hearing, she is in a unique position to speak to Professor McConnell's fitness for the federal bench.

William Marshall, Professor Kagan's onetime colleague in the Clinton White House and now teaching at the University of North Carolina School of Law, concurs. Although he does not see eye-to-eye with McConnell on every issue, such disagreements "have only caused me to support his nomination all the more enthusiastically."[29] Marshall explains:

> I know from firsthand experience that McConnell is fair-minded and non-partisan. I know that he is a person who is open to the ideas of others and that he treats even those who disagree with him with uncommon consideration and respect. Most importantly, I know that beyond all else, Michael McConnell understands, and is committed to, the rule of law. His personal views on matters will not guide his legal interpretations. He will be an excellent judge.

In conclusion, Professor Marshall testifies that McConnell would give a fair shake to every party in his courtroom: "There is no issue, including those in which we have disagreed in law review commentary, that, if I were litigating, I would not welcome his sitting as a judge. I would know that he would weigh my arguments openly and completely."

Sanford Levinson, the Garwood Regents Chair in Law at the University of Texas School of Law, calls himself "a strong Democrat, as well as a law professor who vigorously opposed the nominations of Robert Bork and Clarence Thomas."[30] Professor Levinson further admits to having been "exhilarated" when Senator Patrick Leahy became Chairman of the Judiciary Committee after Democrats took control of the Senate in 2001. But he is an enthusiastic backer of McConnell's. "He possesses not only an uncommon intellect, reflected in his scholarly attainment, but also, and more importantly, and even more impressive (and, sadly, equally uncommon) ability to take his opponents' arguments with complete courtesy and seriousness." Professor Levinson concludes: "I think he would quickly become one of those relatively few judges whose opinions would be widely read and analyzed (and learned from) by persons across the political spectrum, quite independently of the particular position that he would take in any given case."

In a letter to Senator Leahy, Richard Fallon of Harvard Law School conceded that "I do not share McConnell's political outlook. I am a registered Democrat, and I would describe myself as relatively liberal."[31] Despite their disagreements, "I have found his scholarship to be marked by seriousness, thoughtfulness, rigor, and honesty. I have every reason to expect that his judicial opinions would be similarly distinguished." Professor Fallon concludes: "I cannot imagine him pursuing a political or other agenda in contravention of law or of conventions of judicial craft and restraint."

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[29] Letter from William P. Marshall to Senator Patrick Leahy, June 5, 2001.
[30] Letter from Sanford Levinson to Senator Patrick Leahy, June 13, 2001.
[31] Letter from Richard H. Fallon, Jr. to Senator Patrick Leahy, June 6, 2001.

A similar theme was sounded by Professor Fallon's Harvard Law School colleague Daniel Meltzer, the prestigious Story Professor of Law.[32] Professor Meltzer writes in a letter to Senator Hatch:

> I should be clear that there is a great deal about which I disagree with Professor McConnell. . . . Politically, I am a registered Democrat, worked in the Carter administration, supported Vice President Gore in the last election, and on a broad range of issues would view myself, to speak crudely, as more liberal than Professor McConnell. But none of that makes me doubt that he would be a first-rate judge. He is careful, lawyerly, intellectually honest, and open to discussion and debate. He is also attentive to the constraints that lawyers and judges must observe.

Michael Dorf, a self-proclaimed "pro-choice liberal Democrat" who teaches law at Columbia University in New York, wrote to the Committee in support of McConnell, and to reject the claims of certain "[p]ro-choice groups whose aims I share and with whom I have cooperated in the past."[33] Professor Dorf points out that, "on the issues that have mattered most in Professor McConnell's academic work—religious liberty and federal power—he has been on the side of the liberal critics of the Supreme Court." In fact, "[o]n important issues, his substantive views are more liberal than many of President Clinton's appointees. More to the point, his substantive views are driven by a vision of the law as an instrument of fairness and civil liberties, not by ideology."

New York University law professor Larry Kramer, who describes himself as "a strong opponent of the activist-conservative swing in the courts that began with President Reagan," praises McConnell for being "brilliant," "honest," and having "genuine integrity."[34] Most important, according to Professor Kramer, McConnell "cares about the law and the process of lawyering, and he is true to that process and honest with himself. His views are most decidedly conservative, but he will not make an argument unless he can support it properly, and when he cannot he admits as much and acts accordingly." "We need judges like this," Professor Kramer concludes, "of every political stripe." NYU Law School professor Geoffrey Miller agrees: Professor McConnell "believes fervently in the rule of law and in the importance of precedent. He would not be the kind of activist judge who reaches out to change the law."[35]

Finally, three liberal Democrats from California have written to the Committee, emphasizing that Professor McConnell's well-deserved reputation of open-mindedness and integrity make him an excellent choice for the federal bench. Philip Frickey, a law professor at Berkeley, is "a registered Democrat" who "served as a consultant to Senator Biden in 1994 concerning the nomination of Stephen Breyer."[36] He writes: "I do not agree with him in each instance—indeed, we probably disagree as much as we agree. When I read an article of his, however, I know that it has been carefully crafted and is as free from personal subjectivity as is

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[32] Letter from Daniel J. Meltzer to Senator Orrin Hatch, July 3, 2001.
[33] Letter from Michael C. Dorf to Senator Charles Schumer, June 18, 2001.
[34] Letter from Larry Kramer to Senator Patrick Leahy, June 13, 2001.
[35] Letter from Geoffrey P. Miller to Senator Orrin Hatch, July 27, 2001.
[36] Letter from Philip P. Frickey to Senator Orrin Hatch, Sept. 18, 2001.

humanly possible." Larry Alexander, "a life-long Democrat" and the Warren Distinguished Professor of Law at the University of San Diego, writes: "Professor McConnell always stands ready to follow his arguments and evidence wherever they lead. He does not pick his conclusions first and then tailor the arguments and evidence to fit them. He is the complete opposite of an ideologue."[37] And Robert Post, the Morrison Professor of Law at Berkeley, explains that "[i]t would be an understatement to observe that McConnell and I differ profoundly in our political perspectives; I am a liberal Democrat. But I have always held the highest respect for McConnell's acuity and fairness. . . . He is the very antithesis of an ideologue. If I were a party to a case before the Tenth Circuit, I could not ask for a more insightful, objective, or trustworthy judge."[38]

Not only do Professor McConnell's colleagues view him as the picture of intellectual honesty, objectivity, and open-mindedness. They also can testify that, if confirmed, he will treat fairly and equally all litigants who appear before him, no matter what their station in life. Professor McConnell takes seriously the rule of law; he understands that the law exists as much for the poor as the rich, as much for the weak as the powerful.

A former colleague at the University of Chicago Law School, Douglas Baird, is effusive in his praise of Professor McConnell.[39] "In brilliance of mind and in strength of character, he is unlike anyone I have ever met. His views are invariably subtle and well-reasoned, and his judgments sound." More importantly, "[i]f I ever needed a lawyer to represent me, I would want it to be Michael McConnell. If I ever had a case to present, I would want him to be the judge who heard it." It would be difficult to imagine a higher compliment that could be paid to a lawyer.

Ira Lupu, a professor at George Washington University Law School and a former member of the Board of Advisers for Americans United for Separation of Church and State, likewise predicts that Professor McConnell will make a scrupulously fair judge.[40] Having dueled with McConnell in multiple law review articles and public forums over the years, Professor Lupu has become "convinced that his temperament, attitudes, and habits of professional work will make him the sort of judge that all litigants—rich or poor, regardless of cause, creed, or other aspects of identity—will view with respect."

Nor is the esteem for Professor McConnell's fairness limited to academia. According to Stephen Clark, the Legal Director of the ACLU of Utah who has found himself on the same side as Professor McConnell on a number of religious liberties issues, McConnell "has earned the respect and trust of colleagues of every ideological stripe."[41] As a judge, McConnell would be receptive to any litigants who "seek to ground [their] arguments in fundamental constitutional principles and put them forward with rigorous reasoning and a passionate commitment to justice." "[T]here can be no doubt that they will receive a fair and impartial hearing."

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[37] Letter from Larry Alexander to Senator Orrin Hatch, June 6, 2001.
[38] Letter from Robert C. Post to Senator Orrin Hatch, June 5, 2001.
[39] Letter from Douglas G. Baird to Senator Patrick Leahy, July 2, 2001.
[40] Letter from Ira C. Lupu to Senator Patrick Leahy, June 13, 2001.
[41] Letter from Stephen C. Clark to Senator Patrick Leahy, Dec. 7, 2001.

Confirm McConnell Immediately!

During his career as a lawyer, Michael W. McConnell has distinguished himself in every possible way. He has served as a professor at one of the country's most prestigious law schools. He has authored countless law review articles, published in leading journals, that have become required reading for students, academics, and judges alike. And he has made a name for himself as a distinguished Supreme Court practitioner. But Professor McConnell's career has been marked by more than just success. It also has been characterized by a deep and abiding commitment to using the law as a tool for combating discrimination against religious minorities, and advancing the cause of religious liberty. We have every reason to expect that McConnell will bring the same ability, and the same commitment, to the Tenth Circuit.